In The

Supreme Court of the United States

No. 929

REALTY HOLDING COMPANY, a Delaware Corporation, So-called,

Plaintiff in Error,

vs.

LAVINA B. DONALDSON,

Defendant in Error.

IN ERROR TO THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION ON BEHALF OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM

Now comes Lavina B. Donaldson, defendant in error in the above case, and, by her attorneys, moves the Court to dismiss the writ of error herein or to affirm summarily the decision of the United States District Court for the Eastern District of Michigan, Southern Division, for the following reasons:

(See Statement of Fact, pages 6, 7, 8 and 9.)

1. That the appeal is frivolous, without merit and taken for the purpose of delay.

2. That the return was not made within the time prescribed by rule.

3. That the Order granted by the Hon. Charles C. Simons, District Judge, to extend the time in which to make return was without jurisdiction. That the power to grant an extension in which to make return was with the Circuit Court of the Sixth Circuit, the Court that had allowed the appeal.

4. That the return was not made within the time allowed by the extension.

5. That plaintiff's neglect to file copies of the records to be returned, until March 15, 1924, show that the appeal was taken for the purpose of delay.

6. That the Court is without jurisdiction.

7. Because defendant in her motion to dismiss the Bill of Complaint, set forth several reasons therefor, none of which were denied by plaintiff. The following facts stand uncontradicted upon the record, viz:

(a) That the Realty Holding Company was never legally organized in the State of Delaware.

(b) That the Realty Holding Company ceased to function in the State of Delaware, for the reason that it neglected to pay the tax of $57.29 levied for the "year 1920 due March 15th, 1921," and subsequent taxes due the State of Delaware.

(c) That the proceedings instituted by defendant in this case against the Clifford Land Company, in the courts of Michigan, were ample to grant full, adequate and complete relief to and over all parties and the subject-matter.

(d) That Robert M. Drysdale is the President of the Clifford Land Company and the Realty Holding Company.

(e) That Robert M. Drysdale, as President of the Clifford Land Company, after Miss Donaldson, defendant in this case, had instituted proceedings in the courts of Michigan against the Clifford Land Company to oust it from the property in question, and on July 12, 1923, signed and swore to a petition addressed to the Governor of Delaware setting forth:

"That the charter of the petitioner has become inoperative and void by operation of law for non-payment of taxes due to the state, said taxes due to the state being as follows, to-wit:

Franchise Tax for year 1920, due March 15, 1921	$ 57.29
Penalty	13.75
Franchise Tax for year 1921, due March, 1922..	36.24
Penalty	4.35
Franchise Tax for year 1922, due March 26, 1923	20.00
	$131.63

That the company now desires to secure a reinstatement of its rights and franchises under its charter for the purpose of resuming active business."

(f) That the Realty Holding Company *was not reinstated by the Governor of the State of Delaware until July* 18, 1923; *notwithstanding, Robert M. Drysdale swore to, and filed the Bill of Complaint on July* 17, 1923, setting forth that the Realty Holding Company was a duly organized and legally existing corporation in the State of Delaware, and entitled to transact business in the State of Michigan.

(g) That the Realty Holding Company was never authorized to do business in the State of Michigan.

(h) That when the certified copy of the Articles of Incorporation of the Delaware Corporation were filed with the Secretary of State in Michigan, to-wit, on Oct. 31, 1921, Mr. Drysdale knew the Delaware Corporation was a defunct organization, unauthorized, and legally incapable of functioning, either in the State of Delaware or the State of Michigan. To use his language in his application to reinstate the Delaware corporation: "That the charter of the petitioner has become inoperative and void by operation of law for non-payment of taxes, etc."

(i) That on filing a certified copy of the Articles of Incorporation of said Delaware Corporation, in the office of the Secretary of the State of Michigan, the Secretary of State did not sign the Certificate authorizing the Delaware Corporation to transact business in the State of Michigan.

(j) That after the Governor of the State of Delaware reinstated the corporation in the State of Delaware no certificate of the reinstatement was filed with the Secretary of the State of Michigan, authorizing the defunct organization to do business in the State of Michigan.

(k) That at the time Robert M. Drysdale, President of the Clifford Land Company, assigned the 33-year lease over to the Realty Holding Company, to-wit, in July, 1923, the Realty Holding Company was a defunct organization in the State of Delaware and never was authorized to do business in the State of Michigan.

(l) That Robert M. Drysdale fraudulently assigned the 33-year lease of the Clifford Land Company over to the Realty Holding Company for the express purpose of depriving the courts of the State of Michigan of the jurisdiction over the matters pending in its courts, and for the further express and manifest purpose of conferring jurisdiction over the lease-hold interests in the property held by the Clifford Land Company, to the United States Courts.

(m) That the injunction was obtained by Mr. Drysdale, in the United States Court restraining the Courts of Michigan from proceeding to determine the matters in controversy, through fraud, deception and fraudulent representations.

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Attorneys for Defendant in Error.

John C. Spaulding

In The

Supreme Court of the United States

May Term, 1924

No. 929

REALTY HOLDING COMPANY, a Delaware Corporation, So-called,

Plaintiff in Error,

vs.

LAVINA B. DONALDSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

STATEMENT OF FACT

Plaintiff alleges in its Bill of Complaint that it is a Delaware Corporation. That sometime in July it obtained by assignment a 33-year lease of certain valuable property in the city of Detroit, Michigan, which Miss Donaldson, the defendant herein, gave to the Clifford Land Company, a Michigan Corporation.

Miss Donaldson, in the early summer of 1923, instituted certain proceedings in the courts of Michigan to

terminate the lease and to oust the Clifford Land Company from the premises, because of its several defaults.

Robert M. Drysdale is the President of both companies, and practically the owner of all stock in both companies. He claims to have assigned the 33-year lease of the Clifford Land Company to the Realty Holding Company, sometime in July, 1923, and about the time Miss Donaldson instituted her proceedings in the courts of Michigan to oust the Clifford Land Company from her premises. The assignment was entirely without consideration and was made for the fraudulent purpose of instituting this suit in the United States Court and thereby deprive the courts of Michigan of jurisdiction.

The Realty Holding Company was organized in the State of Delaware with a capital stock of $1,000,000 with *but* 10 *shares subscribed, representing* $1,000 *paid in; but in fact, nothing had been paid.* Immediately after its organization it established offices in the city of Detroit, where its President and other officers permanently reside. The Clifford Land Company was organized in Michigan and practically without property. Neither corporation was active, nor had done any business until the transaction in question.

Shortly after Miss Donaldson instituted the proceedings in the Courts of Michigan to oust the Clifford Land Company from the property in question, Mr. Drysdale, as President of the Realty Holding Company, and on July 12, 1923, petitioned the Governor of the State of Delaware to have the Realty Holding Company, which had become "inoperative and void" on account of nonpayment of the tax due to the State of Delaware, to be reinstated, setting forth that the corporation had become "inoperative and void."

The reinstatement of the Delaware Corporation was not made until July 18, 1923; notwithstanding, Mr. Drysdale swore to and filed the Bill of Complaint in this case, on July 17, 1923, the day preceding the reinstatement of the Realty Holding Company, by the Governor of Delaware.

A certified copy of the Articles of Incorporation of the Realty Holding Company was not filed with the Secretary of State for the State of Michigan until Oct. 31, 1921. The Secretary of State for the State of Michigan never authorized the corporation to do business in the State of Michigan. When the certified copy of the Articles of Incorporation of the Realty Holding Company were filed with the Secretary of State for the State of Michigan, the Delaware corporation had become "inoperative and void" because of non-payment of the tax to the State of Delaware. In fact, the corporation had ceased to function about six months prior thereto.

After plaintiff filed this Bill of Complaint, this motion was supported by a certified copy of the petition made by Mr. Drysdale, as president of the Realty Holding Company, to reinstate the Realty Holding Company in the State of Delaware, and certain affidavits in support thereof, *Defendant went to the hearing without answer or affidavit denying the reasons set forth in defendant's motion.*

Judge Arthur J. Tuttle, before whom the motion was heard on Dec. 12, 1923, filed his opinion sustaining defendant's motion to dismiss. Plaintiff made an ex parte application to Hon. Arthur C. Dennison, one of the Circuit Judges of the Sixth Circuit, for an order to permit

an appeal to the Supreme Court of the United States. On Dec. 16, 1923, the appeal was allowed. On Jan. 16, 1924, an ex parte application was made to Hon. Charles C. Simons, one of the judges of the District Court of the United States of the Eastern District of Michigan, Southern Division, for an extension of time in which to make return to this Court. Judge Simons signed an order extending the time from Jan. 16, 1924, to March 16, 1924, in which to make return.

Plaintiff did not file copies of the record with the Clerk of the District Court of the United States of the Eastern District of Michigan, Southern Division, until March 15, 1924, and the return did not reach the Clerk of the Supreme Court until March 17, 1924, as the filing of same will verify.

IS THIS COURT WITHOUT JURISDICTION IN THE PREMISES? IN OTHER WORDS, WAS THE DISTRICT JUDGE RIGHT IN DISMISSING THE BILL OF COMPLAINT FOR WANT OF JURISDICTION?

The best answer we can give to this question is to quote verbatim the very able and lucid opinion of the learned Judge, the Hon. Arthur J. Tuttle, who seemingly passed on the question as one controlled by the most elementary principles.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, IN EQUITY.

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff,
vs.
LAVINA B. DONALDSON,
Defendant.

No. 598.

JOHN R. ROOD, Esq., of Detroit,
Attorney for Plaintiff,

MESSRS. MILLER, CANFIELD, PADDOCK & STONE, of Detroit,
Attorneys for Defendant.

Tuttle, District Judge. This case is before the Court on a motion by defendant to dismiss the bill of complaint for reasons which include asserted absence of jurisdiction in this Court. The only ground of jurisdiction invoked by plaintiff is that based on alleged diversity of citizenship.

The bill avers that plaintiff is a Delaware corporation and that defendant is a resident of Detroit, Michigan, within this district. Plaintiff seeks in its bill to enforce specific performance of a 33-year lease of certain premises located in said city of Detroit, which lease is alleged in the bill to have been granted by defendant to the Clifford Land Company, a Michigan corporation, and to have been thereafter assigned by the lessee named, to the plaintiff. The suit is not claimed by plaintiff to be, and clearly is not, a proceeding in rem, but is a suit to recover rights

and to obtain relief in personam against the defendant. A copy of said lease is attached to the bill and by reference made a part thereof, and various violations of such lease are alleged and complained of as the substantial basis for relief sought. The main object of the suit is the enforcement of the terms and provisions of this lease.

After filing an answer on the merits and a counterclaim (designated therein as a "cross-bill" in apparent disregard of the language of Equity Rule 30), asking that plaintiff be enjoined from interference with the claimed right of defendant to terminate said lease, defendant filed the motion to dismiss already referred to.

Plaintiff has filed a motion to strike from the files the motion to dismiss the bill, urging that defendant is not now in position to object for the first time to the jurisdiction of the Court. This contention is plainly without merit. It is elementary law that the jurisdiction of a federal court over a cause pending therein must affirmatively appear from the pleadings or record in such cause and that the absence of a showing of such jurisdiction not only may be brought to the attention of the court at any stage of the proceedings, but will be noticed, with resultant dismissal of the suit, by the court on its own motion even against the protests of the parties.

Morris vs. Gilmer, 129 U. S. 315.
Thomas vs. Board of Trustees, 195 U. S. 207.
Chicago, Burlington and Quincy Railroad Co. vs. Willard, 220 U. S. 413.
Utah-Nevada Company vs. DeLamar, 133 Fed. 113 (C. C. S. 9).

Indeed, Section 37 of the Judicial Code expressly provides that:

> "If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit."

The first subdivision of Section 24 of the Judicial Code provides, among other things, as follows:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment has been made."

The lease involved herein is such a chose in action.

> *Bradley vs. Hunt*, 8 Wall. 393.
> *Republic Mining Co. vs. Jones*, 37 Fed. 721.
> *Brooks vs. Laurent*, 98 Fed. 65 (C. C. A. 5).

A suit to enforce specific performance of a contract (even if such contract relate to real estate) is a suit to recover upon a chose in action within the meaning of the statute just quoted.

> *Corbin vs. Black Hawk Co.*, 105 U. S. 659.
> *Shoecraft vs. Bloxham*, 124 U. S. 730.

Plant Investment Co. vs. Jacksonville, Tampa and Key West Railway Co., 152 U. S. 71.
State of Maine Lumber Co. vs. Kingfield Co., 218 Fed. 902.

The fact that the main object of the present suit is the specific performance of the lease in question indicates the character of such suit as one to recover upon a chose in action and therefore within the provisions of said statute.

Kolze vs. Hoadley, 200 U. S. 76.

As, therefore, it appears that the assignor of said chose in action and the defendant are citizens of the same state, it is plain that this suit could not have been prosecuted in this court if the assignment mentioned had not been made. It follows that the motion to dismiss the bill must be granted.

It should perhaps be remarked that while the bill does not specifically allege that defendant is a citizen of Michigan, yet no objection on that ground has been raised by defendant and it is apparently undisputed and conceded that the defendant is a citizen of that state, and the matter has been disposed of on such assumption. This assumption, of course, does not prejudice plaintiff, as otherwise its bill should be dismissed for lack of allegation and of any diversity of citizenship between the parties.

Arthur J. Tuttle,
District Judge.

Detroit, Mich.
December 12th, 1923.

Perhaps the following authorities cited by defendant on the hearing of the Motion to dismiss the Bill of Complaint for want of jurisdiction may be of interest to the Court.

It is obvious that the present suit could not have been prosecuted in the Federal Court if the lease had not been assigned by the original lessee, a Michigan corporation, to a citizen of another state. It remains, therefore, only to consider whether this suit is one to recover upon a chose in action. The bill seeks specific performance of a covenant in the lease. The words "chose in action" have several times been construed by the courts to be used in a broad sense, and not to be limited to negotiable instruments and similar obligations.

In *Bushnell vs. Kennedy,* 9 Wall. 387, the claim assigned was a simple contract debt, apparently a mere loan with verbal promise to pay. The court said:

> "That the indebtedness of Bushnell to Mills and Frisby was a chose in action cannot be doubted; for under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract. Nor can it be denied that every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the national constitution and laws, gives to the court jurisdiction of his suit."

In *Corbin vs. County of Black Hawk,* 105 U. S. 659, the suit was for specific performance of a contract to sell land. The court said:

"There can be no doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land, and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. * * * The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts."

In *Shoecraft vs. Bloxham,* 124 U. S. 730, a contract had been made for the conveyance of lands by state trustees to a railroad company. The railroad issued bonds secured by a trust mortgage on the lands, and the trustee sued to compel the conveyance of the lands to the railroad to perfect his security.

The conveyance to the company of the lands held by the trustees pursuant to the contract between those parties is essential to the value of the security offered

for the bonds executed to the Security Construction and Trust Company, and to enable the complainant to discharge the trust accepted by him. But the contract being between citizens of the State of Florida, a suit upon it could not be maintained by the railroad company in the Circuit Court of the United States, and therefore could not be maintained by its assignee, the complainant.

This conveyance of all right, title and interest in and to the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself. If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, is worthless as a security. If he has no interest in the contract he has no standing in court to ask its enforcement, and if he is to be regarded as an assignee of the contract under the deed of trust he is disabled from maintaining the suit in the Circuit Court by Section 629 of the Revised Statutes.

A bill of lading was held to be a chose in action within the meaning of this section and a suit brought by a foreign assignee of a domestic assignor was dismissed in *State Bank vs. C. and N. W. Ry. Co.*, 281 Fed. 345.

A suit by an assignee for specific performance of a contract for sale of land was dismissed, one of the assignors being a citizen of the same state as defendant, in *State of Maine Lumber Co. vs. Kingfield Co.*, 218 Fed. 902.

The cases above cited hold that the words "chose in action" include any action on contract, and specifically include a suit in equity for specific performance of a contract to convey real estate. It necessarily follows that they include a suit for specific performance of the covenants of a lease, and that the plaintiff in this suit has no right to bring such a suit in this court as assignee of a Michigan Corporation.

Plaintiff's argument in the lower court, which we presume will be substantially repeated here, attempted to distinguish the cases cited above and to present the case at bar as being governed by another line of decisions, of which *Brown vs. Fletcher,* 235 U. S. 589, and *Guffey vs. Smith,* 237 U. S. 101, are examples. These decisions hold that suits to protect property rights, as distinguished from suits on choses in action, may be brought in the Federal court by assignees regardless of the citizenship of the assignors.

It seems to us that plaintiff's counsel has misapprehended the distinction. In some of the cases cited by him the action was brought to recover possession of, or establish title to, the property assigned. In the others the action was to protect a vested estate from a threatened wrong arising outside the instrument by which the estate was created. In none was there an action sounding in contract to enforce purely contractual rights existing between the defendant and the plaintiff's assignor at the time of the assignment.

In the present case the plaintiff is threatened with no wrong or injury except the alleged breach of an executory covenant contained in the lease. Unless the

defendant is guilty of a breach of her executory agreement, plaintiff's leasehold interest, under the undisputed facts, has been forfeited by its own breach of the lease. The suit is for specific performance of the executory covenant, which it is claimed defendant has broken. If plaintiff is entitled to specific performance of this covenant, it is entitled to a decree, provided this Court has jurisdiction to entertain the case. If it is not entitled to specific performance of the covenant, it is entitled to no relief from this or any other court.

The true rule is stated in *Guffey vs. Smith,* 237 U. S. 101, as follows:

> "Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even *to enforce an executory promise in a lease already given,* but to protect a present vested leasehold amounting to a freehold interest, from continuing an irreparable injury calculated to accomplish its practical destruction. The complaint is *not that performance of some promised act is being withheld or refused,* but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief."

Under this rule the present case being one "to enforce an executory promise in a lease already given" comes exactly within the definition there given of causes of action, which cannot be assigned so as to confer jurisdiction on the Federal Court.

A different question might arise if the defendant had consented to the assignment and recognized the plaintiff as her tenant; but such is not the case here. In fact the bill of complaint shows on its face (Par. 13) that the plaintiff procured the assignment for the purpose of bringing this suit, and not because it desired to become the actual lessee of the property.

It may be claimed that the plaintiff is entitled to maintain this suit to protect its interest in the property conveyed by it as security (Bill of Complaint, par. 6), but the bill shows that this conveyance was made as security only for the completion of the building according to plans and specifications. The bill further alleges (Par. 7) that the building is completed and ready for occupancy. It is not claimed that defendant's alleged breach of covenant prevented its completion. If the building, so completed, complies with the plans and specifications plaintiff is entitled to a reconveyance of its own property whether the lease of defendant's building remains in force or is forfeited for the defaults of plaintiff's assignor, and its rights in that property cannot be affected in any way by the outcome of this suit.

All of which we most respectfully submit.

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GEORGE L. CANFIELD,
LEWIS H. PADDOCK,
FERRIS D. STONE,
SIDNEY J. MILLER, JR.,
JOHN C. SPAULDING,
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In The

SUPREME COURT OF THE UNITED STATES

No. 929

REALTY HOLDING COMPANY,
A Delaware Corporation, So-called,
Plaintiff in Error

vs.

LAVINA B. DONALDSON,
Defendant in Error.

IN ERROR TO THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Motion on Behalf of Defendant in Error to Dissolve the Injunction or Require Plaintiff to Give Bond to Cover Defaults of $200,000 and Upwards.

Now comes Lavina B. Donaldson, defendant in error in the above case, and, by her attorneys, moves the Court to dissolve the Injunction issued in the above cause or require the defendant to file a bond in the penal sum of $200,000 or such other amount as the Court may deem adequate to cover the several defaults of defendant under

the lease from Miss Donaldson which now amounts to over $200,000 and otherwise to protect the interests of the defendant, until the hearing on the merits takes place or in default of filing bond that the Injunction be dissolved and the case be dismissed. This motion is based on the records and files in this case and the affidavits hereto attached.

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In The
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REALTY HOLDING COMPANY, A Delaware Corporation, So-called,
Plaintiff in Error,
vs.
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Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Brief in Support of Motion to Dismiss or Affirm.

STATEMENT OF FACT

March 31, 1922, defendant, an unmarried woman 65 years of age and upwards, in poor health, hard of hearing, much of the time confined in private hospitals under the care of a doctor, was the owner of a parcel of land situate in the city of Detroit, State of Michigan, reasonably and fairly worth $150,000. That while so seized, she gave a 33-year lease to the Clifford Land Company, a Michigan corporation, organized March 4, 1922, of which Robert M. Drysdale was and now is the President and who then and now is practically the owner of the entire stock with no assets.

The lease provides that the Defendant in Error was to borrow $750,000; to secure, she was to give two mortgages of $500,000 and $250,000 respectively, on the property.

Twenty-five thousand dollars of this loan was to be used by Defendant in Error to purchase a small piece of land contiguous to her property, on which was to be erected a ten-story Hotel-Apartment. $30,000 of this loan Defendant in Error was to use to pay and take up a mortgage of the $28,000 then a lien on the property, and $25,000 of this loan was to be paid Mr. Drysdale and his helper to promote the enterprise. The balance, or $670,000, was to be used in erecting the Hotel-Apartment after paying the commissions for financing the loans and the architect for his services.

By the terms of the lease, the lessee, was to pay the following sums of money and perform the following covenants:

(a) Pay the semi annual interest on the $750,000 loan.

(b) Pay the taxes assessed to the property.

(c) Keep up the insurance.

(d) Pay to Defendant in error, the lessor, on the first day of every month, the sum of $312.50 until March 1, 1924; $468.75 on April 1, 1924, and every month thereafter until March 1, 1925; $625 on April, 1925, and every month thereafter until March 1, 1926, and thereafter increase the amount to comport with the terms of the lease.

(e) That at the end of the second year, pay $30,000 on the second mortgage of $250,000, and a like amount every year thereafter, until the $250,000 is paid.

(f) To provide a sinking fund, on the completion of the building by depositing in a bank in the joint names of the lessor and lessee, a sufficient amount to care for the interest on the $750,000 mortgage, the taxes, the insurance, the rent and the $30,000 annual payment due on the $250,000 mortgage.

In 1920, Robert M. Drysdale organized in the State of Delaware a Corporation under the name of the Realty Holding Company, plaintiff in this case, with a capital stock of $1,000,000, with but 10 shares subscribed, representing $1,000 paid in, on which, in fact, nothing had been paid; that immediately after this organization it established offices in the city of Detroit where its President, Robert M. Drysdale, and the other officers permanently reside. This corporation never had functioned, nor did it transact any business whatsoever until the transaction, so-called, in question took place.

That on July 6, 1923, the Clifford Land Company, being in default of its covenants under the Lease, Defendant in Error, took steps under the Summary Proceedings Act, in the courts of Michigan, to dispossess the Clifford Land Company from the premises.

Shortly after the Summary Proceedings were instituted, Mr. Drysdale, as President of the Realty Holding Company, on July 12, 1923, petitioned the Governor of the State of Delaware to have the Realty Holding Company, whose charter had become forfeited on account of nonpayment of the tax due the State of Delaware, reinstated, setting forth in his sworn petition, that the corporation had become "inoperative and void."

Notwithstanding the fact that the Delaware corporation was not reinstated until the 18th day of July, 1923, Mr. Drysdale, as President of the Realty Holding Company, swore to and filed the Bill of Complaint in this case, on July 17, 1923, the day preceding the reinstatement of the Realty Holding Company by the Governor of the State of Delaware, and in virtue of the Bill so filed, procured an Injunction restraining defendant in this case, the lessor in said lease, from proceeding with the Summary Proceedings theretofore instituted in the courts of Michigan, to oust the lessee from the possession of said premises.

That it is the claim of Mr. Drysdale that shortly after instituting the Summary Proceedings to oust the Clifford Land Company from the possession of said premises, that he, as President of the Clifford Land Company, had assigned the 33-year Lease over to the Realty Holding Company of whom he was the President, thereby lending color to the right of the Realty Holding Company, to file its Bill of Complaint in the United States District Court and thereby and in virtue thereof, oust the Courts of Michigan, from jurisdiction in the Summary Proceedings theretofore instituted by the lessee to obtain possession of the premises for the defaults made in the payments of the several sums of money due under the lease.

The so-called assignment was made without consideration and at a time when the Charter of the Realty Holding Company had become "inoperative and void" in the State Delaware and at a time when it could not function, as a corporation, in the State of Michigan, all of which Mr. Drysdale, President of the two Companies, well knew at the time he claims to have assigned the lease over to the Realty Holding Company.

That the claimed assignment was made in direct violation of Sec. 19 of Subdivision (a) of the lease which provides that all sales or assignments of the lease shall be void, unless the rents, taxes, assessments and other sums stipulated to be paid by the lessee, shall be paid.

That in truth and in fact the taxes, assessments on the property, interests on the two mortgages of $500,000 and $250,000, respectively, were, at the time of the alleged assignment, unpaid.

On motion of defendant this Bill of Complaint was dismissed by the Hon. Arthur J. Tuttle, Judge of the District Court of the United States, Eeastern District of Michigan, Southern Division, for want of jurisdiction.

The Realty Holding Company appealed the case to the Supreme Court of the United States, where the case is now pending.

That while the Order giving plaintiff until Jan. 16, 1924, the right to appeal the case to the Supreme Court of the United States, an ex parte application was made to the Court without knowledge or consent of Defendant in Error, to extend the time in which to perfect the appeal, until March 16, 1924, which was granted without Notice to defendant.

That a bond of $10,000 was given by plaintiff, the Realty Holding Company in which its covenants, only, to pay for the ground rent due lessee under the lease.

That neither the Clifford Land Company, the Realty Holding Company, or Robert M. Drysdale, President and

General Manager of the two Companies, are responsible or collectible. They are, in fact, irresponsible and uncollectible.

That neither Robert M. Drysdale, the Realty Holding Company or the Clifford Land Company have paid, laid out, or expended any money for the lot or any money in the construction of the Apartment-Hotel.

Not only the property on which the Apartment-Hotel is erected, but the building, as well, were paid for by Defendant in Error, from her own resources and from the moneys procured on the loan of $750,000 secured by a mortgage on the property, with the added personal obligation on her part to make good all deficiencies.

Mr. Drysdale has openly, defiantly, and repeatedly stated to defendant and to others that he would ruin defendant; that he would delay the hearing on the matters in Court until she would be glad to accept what he had to offer her, in settlement, which, practically, is nothing; that he would, if unsuccessful in this litigation, start other proceedings whereby and in virtue thereof he would tire her out, and in the end, Defendant in Eror would have nothing.

That the several defaults of Mr. Drysdale in not paying the interest on the mortgages as it became due; in not paying the taxes as they became due; in not paying the $30,000 on the principal of the $500,000 and $250,000 mortgages respectively, as provided for in the lease, and in not paying the insurance on the building, has created a condition of intolerance on the part of the mortgagees and because thereof on to-wit, the 29th day of October, 1924, they served a Notice of default on Lavina B. Donald-

son, Defendant in Error and lessor in said lease, notifying her of the defaults accruing on the $500,000 mortgage, and, again, on November 15, 1924, served a Notice of default on the said Lavina B. Donaldson, notifying her of the defaults accruing on the $250,000 mortgage, stating that if the defaults were not made good proceedings would be instituted to foreclose said mortgages.

The Realty Holding Company has never functioned, either in the State of Delaware or in this State. Neither has it owned any property, nor has it transacted any business whatsoever, until the transaction, so-called, in question took place.

Robert M. Drysdale, the President of the Realty Holding Company, permitted its franchise to be forfeited, in neglecting to pay to the State Treasurer of the State of Delaware, the annual taxes due from the Corporation.

Mr. Drysdale never completed the building according to contract and specifications; but had it prepared for occupancy on or about Oct. 25, 1923 and thereafter and in the month of Nov. 1923 moved in and ever since he has occupied one of the apartments with his family for and in behalf of Plaintiff in Error, and managed and conducted the Hotel-Apartment.

That even since the Hotel-Apartment has been occupied by Mr. Drysdale for and in behalf of Plaintiff in Error, he has collected the rentals and has used the same to suit his own caprices.

That Plaintiff in Error, is in default, under the lease as follows:

There is now due and unpaid in interest on the $500,000 mortgage	$ 94,644
There is now due and unpaid on the principal of the $500,000	22,500
Making a total sum of	$117,144
The total sum paid by Plaintiff in Error on said indebtedness is only	30,388.79
Leaving balance due and unpaid on the $500,000 mortgage	86,755.21
There is now due and unpaid on the second, or $250,000 mortgage	27,693.75
Leaving a balance due and unpaid on the $750,000 loan	114,448.96
There is now due and unpaid, taxes for the years 1922-1923-1924	28,823.95
There is now due and unpaid on insurance...	7,660.00
There is now due defendant from lessee under the lease	7,653.25
There is now due and unpaid in other outstanding bills	31,958.42
Total defaults of Plaintiff in Error to date..	$190,544.58

No sinking fund has been deposited by lessee in any bank as provided for in the lease.

Defendant in Error, has now invested in the property over $900,000 with outstanding obligations of nearly $200-

000 all of which constitute a lien on the premises making more than one million dollars ($1,000,000) that she is legally bound to pay,

That should the foreclosure proceedings be instituted it would be exceedingly difficult for Defendant in Error to re-finance the loan, thereby imperilling the entire property.

Not only is her entire property holdings liable to be swept away, but a personal obligation stands against her for all deficiencies.

That under the laws of the State of Michigan, where the lessee is in default in making payments according to the terms of the lease, the lessor may serve a Notice to Quit and within 20 days be restored to the possession of the premises, if the defaults are not made good.

By the questionable methods resorted to by Mr. Drysdale as the president of the two companies, who is practically the owner of the entire stock, which consists of but a few thousand dollars of assets, only, he has been able to stave off proceedings under the Summary Proceedings Act, hold possession of the premises, and without giving security to adequately protect the interests of the lessor, openly and defiantly asserts he will ruin Defendant in Error.

ARGUMENT

The "Statement of Fact" quite clearly sets forth the facts on which this motion is based, and, fully lays the

foundation for the application of the most elementary principles of law, governing such cases.

However, in view of the claim that we make in behalf of Defendant in Error, that had it not been for the Bill of Complaint filed in the District Court of the United States for the Eastern District of Michigan, Southern Division, and the Injunction issued therefrom, enjoining the lessor from proceeding to judgment in the Summary Proceedings instituted in July, 1923, to dispossess the lessee because of the several defaults under the lease, we feel constrained to make the assertion that Defendant in Error, the lessor, would have been restored to the possession of the premises so rightfully belonging to her, within 20 days from the Notice of Default served on the lessee.

Sec. 13240 of the C. L. of Michigan, 1915, under the Summary Proceedings Act, provides that:

> "The person entitled to any premises may recover possession thereof in the manner hereinafter provided in the following cases:
>
> Subdiv. 1 provides that:
>
> "When any person shall hold over any lands or tenements after the time for which they are demised or let to him, or to the person under whom he holds, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, or any lease or agreement under which he holds, or where rent shall have become due on any such lease or agreement and demand of the rent or possession of the premises is waived therein in writing, and not included in the printed form of the lease or agreement."

Subdiv. 2 provides that:

"When any such rent shall have become due on any such lease or agreement, and the tenant, or person in possession shall have neglected or refused for seven days after demand of the possession of the premises, unless waived as aforesaid, made in writing, to deliver up possession of the premises or pay the rent so due."

Sec. 13241 provides that a complaint in writing on oath may be made before the Circuit Court Commissioner setting forth the default.

Sec. 13243 provides for the service thereof, which shall be "at least two days before the time of appearance of or return of the summons."

Sec. 13244 provides for the trial.

The Summary Proceeding Act under which the lessor had proceeded and which she was enjoined from further pursuing to dispossess the lessor is well calculated to dispossess the defaulting tenant in 20 days, at most, after the Notice of Default is served on the defaulting tenant. In view of the undisputed facts, we submit that the Court should, in its discretionary powers, require Plaintiff in Error to either file a bond in such an amount as will fully make good the present defaults of $200,000 and the further anticipated defaults or dissolve the Injunction and dismiss the appeal.

SUMMARIZATION

Defendant in Error, entered into a 33-year lease whereby and in virtue of which the Clifford Land Company, a Michigan Corporation, was placed in possession of a parcel of land in the very heart of the City of Detroit, then worth at least $150,000.

Defendant in Error, borrowed $750,000 which was evidenced by her promissory note and secured by mortgage on this (her) property, which money, except a small amount, was used in the construction of a ten-story Hotel-Apartment.

The lessee was to do certain things and pay certain monies under the terms of the lease, in default of which, he might be dispossessed of the premises under the Summary Proceedings Act, of Michigan, within 20 days after default.

Being in default, a Notice to Quite ws served on the lessee some time in July, 1923, requiring the lessee to pay several thousand dollars and perform certain other covenants under the lease or be dispossessed from the premises.

Robert M. Drysdale, President of the Clifford Land Company and the Realty Holding Company, a Delaware Corporation, claims to have made an assignment of the lease from the Clifford Land Company to the Realty Holding Company, when the Realty Holding Company was a defunct organization and when its Charter had become "void and inoperative" for the fraudulent purpose

of filing the Bill of Complaint in this case and by fraudulent representations Mr. Drysdale obtained an Injunction, restraining the lessor from proceeding to oust the lessee from the premises, under the Summary Proceedings Act, of Michigan.

Notwithstanding the Charter of the Realty Holding Company had become "void and inoperative" Robert M. Drysdale, President of the two companies, swore that the Realty Holding Company was a valid, subsisting and lawful Corporation and functioning as such, on July 17, 1922, and filed the Bill of Complaint in this case, and, in virtue thereof procured an Injunction restraining the lessor from proceeding under the Summary Proceedings Act to dispossess the lessee from the premises, when in truth, and in fact, the Realty Holding Company was not entitled to do business in the State of Delaware or anywhere else, nor was it functioning as a Corporation. In fact, it had forfeited its Charter for the non-payment of its franchise fee.

The defaults under the lease are now $200,000 and upwards. This sum the lessor, under the terms of the lease, is entitled to have paid IMMEDIATELY. The defaults are piling up at the rate of over $13,000 a month. If something isn't done and done quickly, to protect the interest of the lessor, the Defendant in Error, all of her property holdings will be swept away.

No one can, we most humbly submit, read the record and briefs now on file in this case and come to any other conclusion than that Robert M. Drysdale, the President

of the Clifford Land Company, the lessee under the lease, and President of the Realty Holding Company, the so-called Delaware Corporation deliberately concocted the scheme that if he could make an assignment of the lease from the Clifford Land Company to the Realty Holding Company he could institute a suit in the United States Court and thereby block the Summary Proceedings then instituted to dispossess the lessee and through these and other fraudulent means enable the Realty Holding Company to hold possession for an indefinite period of time.

Therefore, Plaintiff in Error ought to be compelled to file a bond in the penal sum of $300,000 to take care of present existing defaults and future liabilities, in default of which, the Injunction ought to be dissolved and the case dismissed.

All of which we most respectfully submit, for the careful consideration of the Court.

Sidney T. Miller,
George L. Canfield,
Lewis H. Paddock,
Ferris D. Stone,
Sidney T. Miller, Jr.,
John C. Spaulding,
Grant L. Cook,
Joseph H. Clark,
Harold H. Emmons,
W. G. Bryant,
George H. Klein,
L. B. Gardner,
Frank L. Dodge,

Attorneys for Defendant in Error.

UNITED STATES OF AMERICA

In the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity

REALTY HOLDING COMPANY,
Plaintiff,

vs.

LAVINA B. DONALDSON,
Defendant.

County of Wayne ss:

Lavina B. Donaldson being sworn says:

1. That she is the Defendant in Error in the above cause and makes this affidavit in support of her Motion to require Plaintiff in Error to make good the defaults that Plaintiff has suffered to take place under the lease which Plaintiff now holds possession of the Hotel-Apartment in question.

2. That she has read the "Statement of Fact" made by counsel in support of the Motion. That the facts therein stated are true of her own knowledge.

3. That the Hotel-Apartment, if rightly managed, should produce a gross monthly income of $18,000.

4. That Mr. Spears, chief clerk and man in charge of the Hotel, under the employment of Robert M. Drysdale, President of the Clifford Land Company and the Realty

Holding Company, on Oct. 6, 1924, stated that the entire Hotel-Apartment was fully occupied except three apartments.

5. That the Hotel-Apartment consists of 131 apartments renting from $70 to $120 per month, per apartment, with 8 stores on the ground floor with full basement underneath.

6. That Robert M. Drysdale has repeatedly stated that he would ruin this affiant, Defendant in Error; that he would prefer to litigate the case.

7. That the monthly reports made by Robert M. Drysdale in his own behalf and in behalf of the two companies of which he is President, show that the gross receipts are from $8,000 to $10,000 per month, and that the net income as per said reports is but a fraction of the amount required to meet the covenants under the lease. That neither Robert M. Drysdale or the companies of which he is President, have contributed anything toward meeting the several obligations under the lease. That, as the Hotel-Apartment is now being run and the reported income therefrom as accounted for by the said Robert M. Drysdale, the defaults are piling up to such dimensions as to imperil the property holdings of this affiant, the Defendant in Error. And unless something is immediately done to meet the accumulating defaults her whole property will be taken from her.

8. That had it not been for the Bill of Complaint filed in the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity, and the Injunction issued therefrom, the Summary Proceedings instituted in Michigan by this affiant, the lessor in said lease, in July, 1923, to dispossess Plaintiff in Error from the premises, described in the lease, she would have

regained possession of said premises within 30 days at most, or the Plaintiff in Error would have been obliged to have made good all the defaults under the lease then existing and would have been required, in order to continue in possession, to have made good the defaults now existing of $200,000.

Lavina B. Donaldson.

Subscribed and sworn to before me this 26th day of November, 1924.

Donaldson Craig,

Notary Public Wayne County, Mich.

My commission expires Feb. 23, 1927.

UNITED STATES OF AMERICA

In the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity

REALTY HOLDING COMPANY, *Plaintiff,*

vs.

LAVINA B. DONALDSON, *Defendant.*

No. 598

County of Wayne: ss.

Donaldson Craig, being duly sworn, says:

1. That he is now and has been for a number of years past a resident of the city of Detroit, Wayne County, State of Michigan.

2. That he is now and has been in the real estate and loan business for a number of years last past, in the city of Detroit and is now located at No. 1805 Washington Bld. Bldg., in said city of Detroit.

3. That he is personally acquainted with Robert M. Drysdale, who claims to the President and Manager of the Realty Holding Company, a Delaware Corporation, so-called, and the Clifford Land Company, a Michigan Corporation, so-called.

4. That he has positive information that the Apartments were all occupied except three, some three to four weeks ago.

5. That said Apartment-Hotel is located in the very heart of the city of Detroit and well adapted for a hotel and apartment purposes. That said Apartment-Hotel consists of 131 apartments, 8 stores on ground floor and a full basement beneath. That when fully occupied they will bring in $18,000 and upwards per month.

6. That Robert M. Drysdale claims that said Apartment rents bring in only from $8,000 to $10,000 per month.

7. That Robert M. Drysdale has repeatedly stated to this affiant that he would delay the matters in Court between plaintiff and defendant until the defaults would accumulate to such an amount as would make it impossible for Lavina B. Donaldson to re-finance or care for the loans, even though she finally succeeded in dispossessing him.

8. That Robert M. Drysdale also stated to this affiant that he would harrass Miss Donaldson with suits and litigation to such a degree that she would be willing to ac-

cept his terms of settlement and thereby force her to turn the property over to him.

Donaldson Craig.

Subscribed and sworn to before me this 26th day of November A. D. 1924.

Josephine Fox,

Notary Public, Wayne County, Michigan.

My commission expires January 4th, 1927.